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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 207 of the)
Telecommunications Act of 1996)

CS Docket No. 96-83

Restrictions on Over-the-Air)
Reception Devices: Television Broadcast)
and Multichannel Multipoint Distribution)
Service)

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REPLY COMMENTS OF BELL ATLANTIC¹

Bell Atlantic's initial Comments demonstrate that the Commission's proposed rules preempting state and local governmental regulations and non-governmental restrictions that "impair a viewer's ability to receive video programming services" using MMDS antennae and associated equipment² are required by the Telecommunications Act of 1996.³ Accordingly, these Reply Comments address only those few arguments raised by others in their initial comments that merit further discussion.

¹ These comments are filed on behalf of Bell Atlantic Corporation and Bell Atlantic Video Services Company ("Bell Atlantic").

² The Commission's rule must preempt not only restrictions on antennae themselves, but also restrictions on equipment, such as masts, used to mount the antennae in order to ensure that viewers' ability to receive video programming is not impaired. See Comments, filed by BellSouth, at 5-6; Comments of NYNEX Corporation at 5, n.9.

³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act") §207. Bell Atlantic's initial Comments also demonstrate that the Commission should clarify certain aspects of its proposed rules to assure that consumers have access to a full range of choices in the delivery of video programming.

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I. The Commission Should Preempt All Restrictions And Regulations That Interfere With Viewers' Ability To Receive Video Programming.

A number of commenters seek to carve out, in advance, exceptions to the Commission's proposed rule. For example, Community Associations Institute suggests that restrictions on homeowners' rights to place equipment on their individual property would be permissible if the homeowners' or community association placed equipment on common property and made all video services available to community residents through the association's equipment.⁴ The Evermay Community Association suggests that community association architectural control boards could require homeowners to demonstrate that "all feasible means to preclude or, if not possible, to minimize visibility" of antennae have been considered before granting a "waiver" of their non-governmental restrictions.⁵ The Independent Cable & Telecommunications Association and National Apartment Association suggest that the Commission's proposed rule should apply to communities of single family homes, but not to apartment buildings or multiple dwelling units (MDUs).⁶ Each of these carve-outs could impair a viewer's ability to receive video programming over MMDS. Therefore, the Commission's rules should make clear that such restrictions are preempted.

Community Association Institute's proposal that homeowners' or community associations be an intermediary between viewers and video programming providers leaves open the possibility that the association might charge homeowners for providing access to the community antenna, or might require homeowners to provide cable or other facilities from the

⁴ Comments of the Community Associations Institute, et al., at 21-26.

⁵ Comments of the Evermay Community Association, at 2-3.

⁶ See Comments of Independent Cable & Telecommunications Association at 4-7; Joint Response of National Apartment Association, et al., at 7.

antenna to the individual homes. In either case, the homeowner could incur costs exceeding the cost of an antenna. Such additional cost burden could impair a viewer's ability to receive video programming and should not be permitted.

Similarly, requiring homeowners to pursue application and review processes -- like that proposed by Evermay -- would impose undue delay on their access to video programming. And, as American Radio Relay League points out, contesting denial of authority to construct can be nearly impossible for a homeowner.⁷ Because these restrictions and regulations also "impair a viewer's ability to receive [wireless] video programming services,"⁸ they should be preempted.

Finally, policies designed to encourage competition will be ineffective if video programming providers and building owners are permitted to enter into exclusive contracts that prevent individual tenants from selecting from among all available providers for their video services. The Commission should therefore prohibit telecommunications service providers from entering into, or enforcing the exclusivity provisions of, any contract or arrangement under which a service provider compensates the owner of an MDU to be the exclusive provider of any voice, video or data service in, or have an exclusive right of access to, that building.

Such a prohibition would be consistent with the Commission's approach in other contexts in which it has restricted communications providers from entering into exclusive contracts when necessary to increase competition and enhance consumer choice in a communications market.⁹

⁷ Comments of the American Radio Relay League, Inc. at 6-7.

⁸ Telecommunications Act §207.

⁹ *See Implementation of the Cable Television Consumer Protection Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993) (prohibiting exclusive retransmission consent arrangements between cable operators and broadcasters); *Implementation of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993) (prohibiting exclusive contracts between cable operators and satellite programmers); 47 C.F.R. § 63.14

Such rules would eliminate unreasonable barriers to competition without unduly interfering with the interest of MDU building owners and managers. They would not require building owners or managers to grant access to competing providers, unless otherwise required by law.¹⁰ Building owners and managers would still retain discretion, where otherwise permitted, to grant or deny access to whomever they chose. Communications providers would simply be prohibited from inducing building owners or managers to agree to contracts that require the owner or manager to deny access to or permit service by competing communications providers.

There are no constitutional obstacles to prohibiting such exclusive contracts. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Supreme Court struck down a New York statute that required landlords to permit cable operators to install wiring in their buildings on the theory that even a small physical occupation of property without just compensation violates the Taking Clause. Unlike the statute in *Loretto*, however, rules proscribing exclusive contracts would create no physical occupation because they would not

(prohibiting carriers authorized to provide international communications service from entering into exclusive affiliation agreements with foreign carriers or administrations); 47 C.F.R. §§ 73.132, 73.232 (prohibiting exclusive arrangements between broadcast station licensees and network organizations in a particular territory).

¹⁰ Within Bell Atlantic's current 7-state telephone service area, certain state or county laws require building owners to permit access by cable television service providers. *See, e.g.* N.J.S.A. § 48:5A-49; W.Va. Code § 5-18A-4; Anne Arundel (Md.) County Code, Art. 13, § 5-901 to 5-904. Others remove the economic incentive for building owners to deny tenants the benefits of choice and competition by forbidding building owners from demanding or accepting payment from cable service providers as a price of building entry. *See* W.Va. Code §§ 5-18A-4, 5-18A-6 (which provides for just compensation to the landlord for any property the cable operator takes); Va. Code § 55-248.13:2. Virginia also guarantees local telephone exchange companies access to MDUs by giving them both the right and obligation to serve any requesting subscriber in their service area. *See* Final Order, Investigation of Private Resale or Shared use of Local Exchange Service, Case No. PUC850036, ¶¶ 7-8 (Oct. 7, 1986). Copies of each of these documents are attached as Exhibit A.

compel property owners to provide access to competing cable providers.¹¹ Although the rules would prevent service providers from entering into arrangements that exclude competitors from MDU buildings, the Takings Clause does not protect a party's right to exclude others from someone else's property.¹²

Moreover, neither the Due Process Clause nor the Contracts Clause gives communications providers an absolute right to enter into exclusive contracts or enforce exclusivity provisions. First, the Due Process Clause does not "guarantee the unrestricted privilege to engage in business or to conduct it as one pleases."¹³ Due process demands only that regulations restricting freedom of contract "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."¹⁴ This is true even where the regulation "upsets otherwise settled expectations."¹⁵ Rules prohibiting exclusive contracts easily would withstand this scrutiny; they are a rational and reasonable means to remove roadblocks to competition and thereby promote the objectives of the Act. Second, the Contracts Clause affords no barrier because it only applies to restrictions imposed by the states.¹⁶

¹¹ Such rules would not raise the concerns voiced by building owners in this proceeding because the Commission would neither be exercising jurisdiction over building owners and managers nor mandating access to or occupation of their buildings by telecommunications providers. *See* Joint Comments of Building Owners and Managers Assn. Intl. *et al.*, at 2-5 (filed Mar. 18, 1996).

¹² *See Loretto*, 458 U.S. at 436 (the Takings Clause protects "an owner's expectation that he will be relatively undisturbed at least in the possession of his property").

¹³ *Nebbia v. People of the State of New York*, 291 U.S. 502, 527-28 (1934).

¹⁴ *Id.* at 525; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980).

¹⁵ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

¹⁶ *See* U.S. Constitution, Art. 1, § 10 ("No State shall.. pass any...law...impairing the Obligation of Contracts") (emphasis added); *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 n. 9

II. The Commission Should Minimize The Burden Of Administering Its Rules.

As the foregoing examples make clear, the Commission can expect numerous parties to seek exceptions to the Commission's rule. The Commission's rules should minimize the burden of handling such requests assure that viewers' ability to receive video programming is not unduly impaired.

First, the Commission should raise the standard that state and local governments must overcome to obtain a waiver or rebut the presumption that their restrictive regulations are unreasonable.¹⁷ To the extent the Commission makes clear that any exceptions to the Act's clear directive will be strictly scrutinized, it will minimize the number of claims for exception and simplify their review.

Second, the Commission should make clear that the state or local government has the burden of rebutting the presumption or obtaining a waiver. Requiring homeowners to bear the burden of challenging governmental regulations or non-governmental restrictions would raise their cost of obtaining, and therefore impair their ability to receive, video programming services over the air or through MMDS,¹⁸ contrary to the Act.

(1984) ("It could not be justifiably claimed that the Contract clause applies, either by its terms or by convincing historical evidence, to actions of the National Government.").

¹⁷ See Comments, filed by BellSouth, at 3-4.

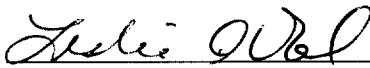
¹⁸ See Comments of the Network Affiliated Stations Alliance at 7-8; Comments of the National Association of Broadcasters at 6-7.

Conclusion

The Act clearly requires the Commission to “prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite.” Act, §207. The Commission’s rules should carry out that requirement.

Respectfully submitted,

Edward D. Young, III
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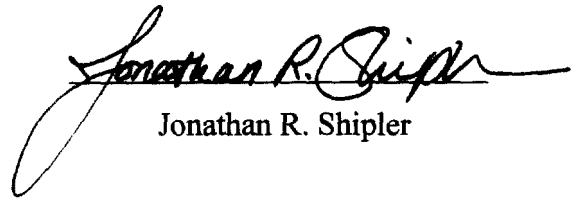
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May 21, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Comments of Bell Atlantic" was served this 21st day of May, 1996 on the parties on the attached list.


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